



REPUBLIC OF KENYA



Mbugua & another (Suing as Legal Representatives of the Estate of Joseph Mbugua Njuguna) v Kariuki & another (Civil Application E462 of 2023) [2023] KECA 1666 (KLR) (15 December 2023) (Ruling)

Neutral citation: [2023] KECA 1666 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E462 OF 2023
DK MUSINGA, JA
DECEMBER 15, 2023**

BETWEEN

**HARRISSON NJUGUNA MBUGUA 1ST APPLICANT
LOISE NJERI MBUGUA 2ND APPLICANT
SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF JOSEPH MBUGUA
NJUGUNA**

AND

**WILFRED MBITU KARIUKI 1ST RESPONDENT
HON. ATTORNEY GENERAL 2ND RESPONDENT**

(Being an application for extension of time to file an appeal against the judgment and decree of the Environment and Land Court at Nairobi (Oguttu, J.) dated 3rd October 2022 in ELC Case No. 7 of 2016)

RULING

1. The two applications herein are related in that the parties are the same, and so is the capacity in which they appear in both applications. The grounds in support of both applications, the annexures relied upon and the orders sought are strikingly similar, save to note that in the application dated 28th September 2023 the applicants had sought orders of stay of execution of the judgment and decree of the trial court dated 3rd October 2022. This prayer is not contained in the application dated 12th October 2023. In both applications the applicants invoke the provisions of what they refer to as rule (instead of section) 7 of the *Appellate Jurisdiction Act* and rule 4 of the *Rules* of this Court, seeking extension of time within which to file an appeal against the judgment and decree of the Environment and Land Court at Nairobi (Oguttu, J.) dated 3rd October 2022 in *ELC Case No. 7 of 2016 (OS)*.



2. The grounds in support of the application are borne on the face thereof and in the affidavit in support sworn by Loise Njeri Mbugua. It is contended that the applicants were not served with the hearing notice before the suit came up for hearing before the trial court on 13th June 2022. In this connection, Loise Njeri Mbugua challenges the affidavit of service sworn by one Ambrose Muthama, wherein it is deponed that she was served with a hearing notice on 31st May 2022.
3. It is deponed that the applicants were not accorded an opportunity to be heard before the trial court rendered its judgment against them on 3rd October 2022. The applicants state that they only came to learn of delivery of judgment later despite the non-service of the hearing notice upon them.
4. The reason for the delay in filing the notice of appeal is therefore attributed to the lack of information about the delivery of the judgment, which stems from the failure to serve them with a hearing notice. They contend that the intended appeal is arguable and has high chances of success as the trial court did not consider the sale agreement signed by the parties evidencing the sale of the suit property; that if the application is not allowed, the applicants stand to suffer substantial loss; and that no prejudice will be suffered by the 1st respondent if the application is allowed.
5. The applications are opposed by way of replying affidavit sworn by Wilfred Mbitu Kariuki, the 1st respondent. It is deponed that Loise Njeri Mbugua was served with the hearing notice and that she was in court when the hearing date was set. It is further contended that she has not deponed as to how she came to learn that judgment had been delivered by the trial court. In sum, the 1st respondent contends that no plausible explanation has been tendered for the delay in instituting the appeal and that he shall be prejudiced if the application is allowed.
6. Through their written submissions dated 8th November 2023, the applicants contend that their right to a fair hearing as provided under Article 50 (1) of the [Constitution of Kenya, 2010](#) was contravened and that in the circumstances, this Court ought to exercise its discretion to extend time so that the applicants can have their day in court on appeal. They reiterate that the intended appeal is arguable; that they will suffer substantial loss if the application is not allowed; and that no prejudice will be suffered by the 1st respondent if the application is allowed.
7. On his part, the 1st respondent through his written submissions dated 17th November 2023 contends that the applicants have not satisfied the conditions set out in the decision of the Supreme Court [Electoral and Boundaries Commission & 6 others](#) [2013] eKLR to warrant this Court's exercise of discretion in their favour.
8. I have given due consideration to this application, the replying affidavit, the submissions by both parties and the law. The principles upon which this Court determines an application for extension of time under rule 4 are well settled. The Court considers the length of the delay; the reason for the delay; the chances of success of the intended appeal; and the degree of prejudice that would be occasioned to the respondent if the application is granted. See *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2 EA 231; *Fakir Mohammed v Joseph Mugambi & 2 Others* [2005] eKLR; and [Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees](#) [2020] eKLR.
9. The decision which the applicants intend to appeal against was delivered on 3rd October 2022. Pursuant to the provisions of rule 77 (2) of the [Rules](#) of this Court, the period for filing the notice of appeal (14 days) lapsed on or about 17th October 2022. The notice of appeal annexed to the affidavit of Loise Njeri Mbugua is dated 28th September 2023. Therefore, there is a time gap of close to one calendar year from the date of delivery of the impugned judgment and the date of the afore mentioned notice of appeal. The explanation tendered by the applicants is that they were not served with the hearing



notice and that they were unaware that judgment had been delivered. Loise Njeri Mbugua depones at paragraph 5 of her affidavit as follows:

“That it was shock to me to discover that judgment had been passed despite me never being served by any notice nor attending any court proceeding.”

10. She does not depone with precision the exact date or period within which she came to learn that judgment had been delivered by the trial court in favour of the 1st respondent. Was it within a week, a month or several months after delivery of the said judgment? She has also not stated in her affidavit how she came to learn that judgment had been delivered. It is not the business of this Court to speculate when or how the applicants became aware of delivery of judgment. In the absence of such specificity, I can only conclude that there was delay in filing the notice of appeal and the period of delay has not been satisfactorily explained. The delay of close to one calendar year was therefore unreasonable and inexcusable.
11. In *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR, this Court stated:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favor. There has to be valid and clear reasons, upon which discretion can be favorably exercisable.”
12. As the reason for the delay has not been satisfactorily explained by the applicants, it would be superfluous for me to apply my mind to the other factors to be considered in applications of this nature. In the result, I decline to exercise my discretion to grant the prayer to extend time. Accordingly, I dismiss the application dated 28th September 2023 with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF DECEMBER 2023.

D. K. MUSINGA (P)

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

